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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 930.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A Corporation,
Petitioner,

vs.

ELMER RICHARDSON,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for a Writ of Certiorari.

M. C. HARRISON,
Attorney for Respondent.

HARRISON & MARSHMAN,
Guardian Bldg., Cleveland, Ohio,
Of Counsel.

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ADDITIONAL STATEMENT OF FACTS.

At the outset of this brief we desire to clarify somewhat the Statement of Facts contained in the Petitioner's Summary Statement.

This can be done most easily by quoting directly from the Opinion of Judge Hamilton:

> "Appellee had been employed by the appellant for nine years and at the time of the accident had been a member of a track repair and service crew since 1928 which operated under the supervision of a foreman. On the morning of the accident, he was pulling spikes when the foreman directed him to assist two other men who were cutting a steel rail with a chisel. The rail had been cut originally with an acetylene torch but had cracked and split, and, on explicit directions from the supervisor, the defective end was being chiseled off by a cutting crew consisting of three men, two alternating in swinging sledges and one holding the chisel. After one side was cut, appellee was directed by the foreman to turn the rail so the upper part or ball would be exposed and adjust it 'workwise' on the angle bar for the cutters, which he did and after this adjustment,

started to walk to a safe distance when he heard the sledges strike and startled, turned half way around and a sliver of steel struck him in the right eye, totally destroying the sight. The foreman had given instructions to the men cutting that they should at all times give the man turning the rail sufficient time to get in the clear and the employees who did the adjusting were instructed to get far enough away to be in the clear.

"There is substantial evidence in the record that it was unsafe to have the face turned toward the chiseling within thirty feet without goggles and that appellee requested the cutters to wait until he got in the clear before striking the chisel."

It is obvious, both from the Summary Statement in the Petitioner's brief and from the foregoing quotation from the Opinion in the Circuit Court of Appeals, that the question involved in this case is essentially factual.

There is ample evidence to show that the foreman had issued explicit instructions both to the plaintiff to get in the clear (inasmuch as he had no goggles) *and* to the other men not to begin pounding or cutting until the plaintiff was in the clear.

"Q. Were the men engaged in the cutting operation in this particular case, the Higginbotham boys and Winston Bailey, under instructions not to start cutting until those who were about and did not have goggles had an opportunity to get in the clear?

A. Well, the instructions—they had been instructed by me—I asked them not to cut the rails until the men got in the clear.

Q. * * * were the cutters told not to start cutting until men like Richardson, whose duties required them to turn the rail or adjust it into place, were given an opportunity to get in the clear?

A. They was told by me, as the foreman, to give them men plenty of time to get away." (44, 45.)

This specific testimony from the foreman himself was corroborated by the testimony of one of the cutters, Deward Higginbotham:

"Q. Did these instructions then extend to him?
A. No, just the chisel man and the hammer men.
Q. You were to wait until the fourth man got out of the range of the chips?
A. Yes, sir.

* * * * *

Q. What were the instructions to the other three men?
A. To wait until the fourth man got out of the range of the chips." (46.)

And this again was corroborated by another witness, Ezra Higginbotham:

"Q. And your instructions were to wait until the turning man was in the clear before you started striking; is that right?
A. Yes, sir." (30.)

The plaintiff himself had received specific instructions (inasmuch as he had no goggles) that he was to get himself "in the clear" before the cutting started.

"Q. Had you ever received any instructions from Walter Williams, the foreman, as to what you were to do while rail-cutting was going on, if you didn't have goggles?
A. Yes, sir.
Q. What were those instructions?
A. To get back in the clear.
Q. And did those instructions indicate how far you were to go to regard yourself in the clear?
A. Well, I took it about 35 or 40 feet.

* * * * *

Q. You have just given us a moment ago the estimate of 35 or 40 feet. Was that your estimate of what was in the clear, or what was told to you by Williams?

A. That was my estimate of what was in the clear.

Q. * * * did Williams tell you that also, or did he tell you something different from that?

A. He told me that also." (20.)

While the plaintiff was trying to get "in the clear" in conformity with the express instructions of his foreman, both to himself *and* to the cutters, the cutting started when he had taken only a few steps. He turned to remonstrate and as he was in the act of turning, was hit in the eye with a chip of steel.

"Q. How far do you think you had walked from the end of the rail where the cutting was going on before anything happened?

A. Around 18 or 20 feet, in that neighborhood.

Q. And then what, if anything, attracted your attention and what did you do?

A. I heard them start pounding.

Q. Then what did you do?

A. I started to turn around to see what they were doing, and it smacked me in the eye.

Q. And what smacked you in the eye?

A. The steel chip off of the rail." (18, 19.)

Not only had the foreman instructed the plaintiff to get in the clear before the cutting started—and given further instructions to the cutters themselves to wait until he was in the clear before starting—but the plaintiff himself had told them to wait.

"Q. When you stood there with them, and as you were about to walk away, was anything said by you to them or by them to you?

A. Yes, sir.

Q. And what was said?

A. I told them to wait till I got in the clear.

Q. What, if anything, did they say to you, or any of them say to you?

A. One of them said 'All right.'" (19.)

When the cutting began the plaintiff started to turn around to remonstrate.

"Q. Now, you said you started to turn around to see what they were doing. You knew what they were doing?

A. I say I started to turn around to tell them to wait till I got in the clear. I had that in my mind. I didn't tell them anything.

* * * * *

Q. You started to turn around to see what they were doing, and with the intention of telling them to stop?

A. That is right." (23, 24.)

QUESTIONS PRESENTED.

In support of this Petition for Certiorari the Petitioner makes two points:

(1) Was Richardson's act in turning to face the cutting operation the sole, proximate cause of the injury?

(2) Did Richardson assume the risk as a matter of law?

I. WAS RICHARDSON'S ACT IN TURNING TO FACE THE CUTTING OPERATION THE SOLE, PROXIMATE CAUSE OF THE INJURY?

The Petitioner argues that there was no evidence of negligence on the part of the Railway Company.

This seems to us too absurd for serious argument.

Without dispute, the foreman instructed the cutters *not* to begin cutting until Richardson was *"in the clear"*; and that distance was estimated by the foreman at thirty-five to forty feet.

This instruction was fortified by an additional request from Richardson himself.

Despite this instruction, and despite this request, the cutting operation was started before Richardson had gone half way.

We submit that this violation of a specific instruction was, to say the least, some evidence of negligence.

It is argued, however, by the Petitioner, that Richardson himself was guilty of such negligence as to defeat recovery under the rule of *Railway v. Wiles*, 240 U. S. 440.

This case has no relationship whatever to the facts at bar. Wiles was a freight brakeman who neglected his duty to place warning signals so as to protect his train from an approaching train. His negligence was not debatable; nor was it possible to argue that his own death was not produced directly and proximately by his own violation of a clear, specific and mandatory rule.

In our case at bar we have, on the contrary, clear negligence on the part of the Railway Company in the failure of the cutters to comply with orders of their superior.

Even if Richardson were negligent, it would still be a case for the application of the doctrine of comparative negligence, and certainly could not in any situation foreclose his right of recovery as a matter of law.

It will be kept in mind that counsel for the Railway Company did not request any instruction on the doctrine of contributory negligence, or, more accurately, of comparative negligence. Counsel insisted at all times that they were entitled to a directed verdict.

On the issue of negligence, therefore, it was only necessary for us to show that there was substantial evidence of Petitioner's negligence. Once that was shown (and unless the doctrine of assumption of risk prevented), Richardson was clearly entitled to go to the jury.

II. DID RICHARDSON ASSUME THE RISK?

It is the claim of Petitioner that Richardson assumed the risk of the injuries which he suffered, and therefore can not recover.

In support of this claim it has cited a number of cases which (it seems to us) have no relevancy whatever.

In the case of *C. & O. Ry. v. Kuhn*, 284 U. S. 44, for example, the plaintiff was also hit by a chip of steel.

On the face of it, therefore, the decision in that case—that the injured man had assumed the risk—might be thought to be applicable to our case at bar.

Upon examination, however, it is obvious that the facts are utterly dissimilar.

In the *Kuhn* case, the plaintiff was injured as he *stood* by the cutters—knowing that chips were likely to fly—and that he was likely to be injured.

But in our case at bar Richardson did *not* stand by. *He* was on his way to get "in the clear." He had specifically asked the cutters to wait; and they had been instructed by their foreman to wait.

How can one read *voluntary assumption of risk* into that sort of conduct?

The best proof of the unsoundness of Petitioner's claim is to be found in an inquiry as to *when* the risk was assumed.

Certainly it was not assumed by the act of asking the men to wait till he was in the clear.

Certainly it was not assumed by the act of starting to walk away.

It follows, therefore, that if there was any assumption of risk, the Petitioner is driven to the claim that it was in the act of pausing to turn while in the act of walking away.

Surely it is a strange modification of the old doctrine of assumption of risk to argue that a single act of this character is enough to disqualify Richardson from all rights of action.

If anything—it was a single act of contributory negligence; and not a voluntary acknowledgment of and acceptance of risks and hazards that were necessary and inherent in the situation.

But the real fact of the matter is that when Richardson paused and turned, he turned to *remonstrate* with the cutters for starting too quickly.

"Q. Then as you walked, you say you got about 18 or 20 feet away * * * you heard * * * them start pounding * * *?

A. Yes, sir.

Q. Did you say anything to them as you turned?

A. I didn't but I had intentions to say.

Q. Had intentions to do what?

A. I had intentions to tell them to wait till I got farther away.

Q. How far had you turned when, as you express it, the steel struck you in the eye?

A. About half way around." (19.)

* * * * *

"Q. Now, you said you started to turn around to see what they were doing. You knew what they were doing?

A. I say *I started to turn around to tell them to wait till I got in the clear.* I had that in my mind. I didn't tell them anything.

* * * * *

Q. You started to turn around to see what they were doing, and *with the intention of telling them to stop?*

A. That is right." (23, 24.)

Counsel assume (without warrant, we submit) that turning to remonstrate was not only negligence, but that there would have been no chance of danger or harm if he had not turned. This would seem to be inconsistent with the evidence.

"Q. Now the danger from those chips was that they might strike you in the face?

A. Certainly.

Q. If they struck you in the body, in the back, they wouldn't do you any particular harm?

A. Yes, I think so.

Q. They would sting you?

A. Yes, sir.

Q. They wouldn't produce any serious injuries?

A. At the speed that there one was going to do me that damage, if it hit me in the back of my head." (21.)

The general rule as it relates to the doctrine of assumption of risk is stated in *Roberts on Federal Liabilities of Carriers*, 2 ed., Vol. 2, Section 831, as follows:

> "§ 831. *Ordinary risks and known or obvious extraordinary risks assumed by interstate employees.* The nature and elements of the doctrine of assumption of risk, as applied to interstate employees of interstate carriers under the federal act, having been well established in a series of controlling decisions by the United States Supreme Court. The risks are of two kinds, ordinary and extraordinary. Ordinary risks are those that are normally incident to the occupation in which an employee voluntarily engages. An employee is conclusively presumed to have knowledge of such risks and assumes injuries arising therefrom. Such ordinary risks are assumed by an employee whether he is actually aware of them or not; for the dangers and risks that are normally or necessarily incident to his occupation are presumably taken into account in fixing the rate of wages. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the carrier to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These are known as extraordinary risks. An employee has the right to assume that his employer has exercised due care for his safety. He is not to be treated as assuming these extraordinary risks arising from defects due to the negligence of the employer unless he has knowledge of them and the danger arising therefrom, or unless the risk and danger are so obvious that an ordinarily prudent person under similar circumstances would have known the risk and appreciated the danger arising therefrom."

Furthermore, as pointed out by the same authority, ordinarily there is no assumption of the negligence of a fellow servant (§ 833, page 1619):

> "* * * Under the federal act, an employee has the right to presume that the employer has exercised reasonable care for his safety, and this presumption ap-

plies to the acts of a fellow servant. He does not ordinarily assume the negligent act of a fellow servant; but if he becomes aware of the risk and danger arising therefrom and continues in the employment, or if the risk and danger arising therefrom are so obvious that an ordinarily prudent person under the same circumstances would have observed the one and appreciated the other, then an employee assumes the risk arising from the negligent act of a coemployee under the national statute."

Under the rule, as above stated, it would seem quite clear that there was no assumption of risk in the case at bar.

This very question was considered by the Trial Court, and the following observations were made by Judge Jones in overruling a motion for a directed verdict:

"Mr. Wickham: I would like to make a motion that the Court arrest the testimony from the jury and direct the jury to return a verdict for the defendant, on the ground that the plaintiff's own testimony shows that he knew and appreciated the risk and assumed it.

"The Court: Well, but under his testimony he states he requested the cutters to wait until he had gotten into the clear and they failed to do so. * * * That would show an appreciation of the danger and for that reason a desire to get into the clear.

* * * * *

"Mr. Wickham: * * * supposing we say that is some evidence of negligence in disregarding his request, then I say that being some evidence of negligence, the doctrine of assumed risk is clearly applicable because he, an experienced employe * * * knowing the likelihood of the flying of chips, and knowing that he could or could not, as he chose and as he voluntarily acted, expose himself or keep himself protected from those chips, he took the alternative of turning toward the work he knew was going on, so assumed the risk. The assumption of risk applies not only to those risks which are ordinarily the hazards of an industrial occupation but those risks which are caused by the negli-

gence of the employer himself, if you please, if the employe knows of the existence of that want of care of the employer and voluntarily exposes himself to that very danger. Now, he did that exactly.

"The Court: I agree with you he waives the rule if the evidence shows on all other occasions the cutters had stopped (probably a misprint for started) before the man got in the clear * * *. Suppose it struck him in the back of the neck; he wouldn't have turned? Do you say he would have assumed the risk of injury?

"Mr. Wickham: I say he would have suffered no severe injury.

"The Court: The question has nothing to do with the extent of the injury * * * I do not think the question of turning enters into the question of assumption of risk. I think the doctrine of assumption of risk is whether he assumed the risk of the cutters starting before he reached a safe distance. If he knew the cutters were in the habit of starting to cut before he and men engaged in like service were what they call 'in the clear,' well, I agree with you there might be a question of the assumption of risk." (30-32.)

There was not one syllable of evidence in the record to show that the cutters were in the habit of beginning before the Respondent or men without goggles had gotten in the clear; and there was, therefore, we submit, no basis for the claim that he had conclusively assumed the risks of such conduct on their part.

As stated by *Roberts* in the treatise above referred to, Vol. 2, page 1636:

> "Knowledge of the risk is the watchword of the defense of assumption of risk."

If this be true, then how can it be seriously claimed that Richardson had knowledge of the risk that the cutters would violate the instructions of their own foreman, and would further fail to heed the request and warning given by Richardson himself?

If there was anything whatever that Richardson did that he ought not to have done, it was clearly a matter of contributory negligence; and *not* any question of assuming a risk of which he had knowledge.

One of the leading cases is *C. & O. Ry. v. De Atley*, 241 U. S. 310, 60 L. Ed. 1016.

In this case the plaintiff, a brakeman, was injured while attempting to mount a freight engine while the train was in motion.

His employment required him to mount such moving trains frequently, and this could be done with reasonable safety if the train was moving at a moderate rate of speed.

In this particular case, however, the train was moving somewhat more rapidly than usual, and it was the brakeman's claim that his injuries were due to this excessive speed.

One of the problems was whether or not this was a hazard or risk which the plaintiff had assumed.

The Supreme Court of the United States, speaking through Mr. Justice Pitney, held that the ordinary risk of mounting a moving engine was one which was known to him and was, therefore, assumed by him; but the increased risk due to the greater speed of the train was not one that was assumed by him. It was held, on the contrary, that the plaintiff, who was not shown to have known or appreciated the increased risk of the greater speed, could not, as a matter of law, be said to have assumed this increased hazard, and that although the extraordinary risk which the plaintiff encountered was exactly the same kind of a hazard as the one which he ordinarily assumed, it was in fact sufficiently greater in degree that the doctrine of assumption of risk would not conclusively dispose of his claim.

The following rule was laid down by Mr. Justice Pitney:

> "* * * According to our decisions the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

Counsel have not cited, and doubtless were unable to find any case where it has been held that an injured railroad employee assumed the risk in a situation at all similar or analogous to the facts of the case at bar.

In the case of *R. R. Co. v. Horton,* 233 U. S. 492, the facts involved a guard glass which was entirely absent, and the plaintiff, with full knowledge of the absence of this guard, continued to use the water gauge, and was, of course, held to have assumed the risk of such a condition.

We submit that has no application or relevancy to the facts of the case at bar.

Obviously, Richardson in the case at bar, if he had stood beside the cutters without complaint and without any attempt to get into the clear, would have assumed the risk of flying particles.

But that is precisely what he did *not* do. On the contrary, he *sought to escape the risk* by following out the instructions of the foreman.

We submit, therefore, that under the clear authority of the *De Atley* case, *supra,* and the well recognized principles of the doctrine of assumption of risk, there was here no such knowledge that the men would begin cutting as to cause the continuance in employment to establish conclusively an assumption of this risk on the part of Richardson.

IN CONCLUSION.

We submit that there is nothing whatever in this case that warrants or requires further review, and that our controversy is essentially one of fact, rather than with respect to the principles of law which ought to obtain.

We submit, therefore, that no adequate reason has been shown why there should be a further review by this Honorable Court.

Respectfully submitted,

M. C. HARRISON,

Attorney for Respondent.

HARRISON & MARSHMAN,

Of Counsel.